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In the Supreme Court of the United States

No. 73-1394

DOYLE D. SMITH, H. DOYLE BRINDLE, KENNETH P. HESS,

Petitioners

v.

WARREN CURTIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

No.

Doyle D. Smith, H. Doyle Brindle, Kenneth P. Hess,
Petitioners

v.

WARREN CURTIS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Doyle D. Smith, H. Doyle Brindle, and Kenneth P. Hess, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on December 17, 1973.

OPINIONS BELOW

The opinion of the U. S. Court of Appeals is unreported and is printed in Appendix A hereto (App. 1a-15a).

The opinion of the U. S. District Court is unreported and is printed in Appendix B hereto (16a-21a).

JURISDICTION

The judgment of the U. S. Court of Appeals was entered on December 17, 1973. Jurisdiction of this court is conferred by 28 U.S.C. §1254(1), §2101(c).

QUESTION PRESENTED

Whether a cause of action is stated pursuant to 42 U.S.C. §1983 by a complaint which alleges an isolated attack upon the plaintiff by a fellow prisoner in the presence of prison officials who failed to disarm or otherwise restrain the aggressor.

STATUTE INVOLVED

The statute principally involved is 42 U.S.C. §1983, which is set forth in Appendix C (App. 22a).

STATEMENT

Warren Curtis, Respondent herein, filed a complaint in the United States District Court for the Eastern District of Pennsylvania asserting as jurisdictional bases 28 U.S.C. §1331, §1343(3) and (4); 42 U.S.C. §1983, §1981; and under Pennsylvania Law of tort liability for negligence.

The complaint alleged that on March 24, 1970, Respondent sustained the loss of an eye as a result of an assault by a fellow inmate, Angus Russell Everette. The assault took place in the kitchen of the Huntingdon Correctional Institution in Huntingdon, Pennsylvania, where Respondent was confined. Both Respondent and his assailant were allegedly in the presence of prison officials Smith, Brindle, and Hess, Petitioners herein, who allegedly failed to take action either to disarm the assailant or otherwise prevent the assault. The complaint further alleged that Petitioners' conduct deprived Respondent of the right to be secure in his person, to be free of cruel and unusual punishment, and to the equal protection of the laws. Respondent sought punitive and compensatory damages.

Further, the complaint named Angus Russell Everette, the assailant, as a defendant, together with Superintendent Harry E. Russell, Commissioner of the Bureau of Correction Arthur T. Prasse, the Bureau of Correction for the Commonwealth of Pennsylvania,

the Commonwealth of Pennsylvania, and your Petitioners, Smith, Brindle, and Hess.

A motion to dismiss was filed on behalf of all defendants except Everette, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, to test the sufficiency of the complaint in stating a cause of action. The motion was granted on August 8, 1972, dismissing the complaint against all defendants for failure to state a cause of action under the Civil Rights Act, 42 U.S.C. §1983. Respondent herein appealed from the order of dismissal to the United States Court of Appeals for the Third Circuit.

The Third Circuit affirmed the district court order as to all defendants except Everette, Smith, Brindle, and Hess. As to these defendants the case was remanded to the district court for further proceedings.

REASONS FOR GRANTING THE PETITION

The Third Circuit Has Rendered a Decision in Conflict With the Decisions of Other Circuits

This case presents a question involving the scope of civil rights actions pursuant to 42 U.S.C. §1983. It is by now well established that in order to state a cause of action cognizable under the Civil Rights Act the conduct complained of must have been done by a person acting under color of state law and must have deprived the complainant of rights, privileges and immunities secured by the Constitution and laws of the United States. *Basista v. Weir*, 340 F. 2d 74 (3d Cir. 1965).

The Court below has so broadened the concept of what constitutes a constitutional deprivation that a review of this decision is of great public importance. In addition it appears that the Third Circuit decision is contrary to the decisions of all other circuits which have had occasion to consider the question and that the resulting conflict should be settled with finality.

In this case, the Third Circuit has held that the failure of prison officials to prevent the assault of an inmate by a fellow prisoner constitutes a violation of the due process clause of the Fourteenth Amendment and is therefore actionable under 42 U.S.C. §1983. The court relied for its decision on *Johnson*

v. Glick, 481 F. 2d 1028 (2d Cir. 1973), a factually distinguishable case which held that the unprovoked attack on a prisoner by a prison guard amounts to deprivation of liberty without due process of law.

A decision of the Ninth Circuit, factually similar to Petitioners' case, is in direct conflict with the Third Circuit opinion. In *Williams v. Field*, 416 F. 2d 483 (9th Cir. 1969), *cert. denied*, 397 U.S. 1016, 90 S. Ct. 1252, 25 L. Ed. 2d 431 (1969), the court held that the fact that prison officials, in an isolated instance, and without oppressive bad motive, failed to protect an inmate from attack by a fellow prisoner did not constitute denial of the equal protection of the law. The court therefore sustained a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In a case out of the Seventh Circuit, the court held that where one inmate was assaulted by another, the alleged negligence of prison guards in supervising the area where the assault occurred did not constitute cruel and unusual punishment. *Gutierrez v. Department of Public Safety et al.*, 479 F. 2d 701, 719 (7th Cir. 1973).

In *Puckett v. Cox*, 456 F. 2d 233 (6th Cir. 1972), the Sixth Circuit relied on *Williams*, supra, in holding that the complaint against a prison warden was properly dismissed by the district court. Here, the court rejected the position that the alleged negligence of the prison warden in permitting a violent prisoner to roam within the prison and in allowing that prisoner to have access to a dangerous instrument, resulting in injury to another prisoner, constitutes a

denial of equal protection of the law cognizable under §1983.

Petitioners recognize that tortious conduct may well be a basis for relief under §1983 of the Civil Rights Act. *Jenkins v. Averett*, 424 F. 2d 1228, 1232 (4th Cir. 1970). However, this tortious conduct must assume constitutional proportions if a cause of action is to withstand a motion to dismiss. It is submitted that in the instant case, the complaint has failed to establish conduct which violates a constitutional right, privilege or immunity and that the proper forum for an action in negligence should be in the state courts.

CONCLUSION

It is submitted that the question presented for review is of great public importance since the Third Circuit decision opens the proverbial Pandora's box by inviting civil actions by all inmates who are subject to tortious conduct at the hands of fellow prisoners. The resulting litigation will not only overburden the district court dockets, but it will unnecessarily burden prison personnel who must present a defense in litigation which may often prove frivolous.

For these reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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March, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 72-1935

Warren Curtis, 1527 Carpenter Street,
Philadelphia, Pennsylvania,
Appellant

v.

Angus Russell Everette
1117 West 8th Street
Chester, Pennsylvania

Head Steward Doyle D. Smith
Huntingdon Correctional Institution
Huntingdon, Pennsylvania

Correctional Officer H. Doyle Brindle
Huntingdon Correctional Institution
Huntingdon, Pennsylvania

Dietician Kenneth P. Hess
Huntingdon Correctional Institution
Huntingdon, Pennsylvania

Arthur T. Prasse
107 May Drive
Apartment No. 3
Camp Hill, Pennsylvania

Harry E. Russell
R.D. No. 1
Huntingdon, Pennsylvania

Bureau of Corrections for the
Commonwealth of Pennsylvania
c/o Attorney General,
J. Shane Creamer
State Capitol
Harrisburg, Pennsylvania

Commonwealth of Pennsylvania
c/o Attorney General,
J. Shane Creamer
State Capitol
Harrisburg, Pennsylvania

(D.C. Civil No. 72-590)

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Submitted Under 3rd Cir. Rule 12(6) September 11, 1973.

Before McLaughlin, Van Dusen and Rosenn, Circuit Judges

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OPINION OF THE COURT
(Filed December 17, 1973)

Van Dusen, *Circuit Judge*

This appeal challenges an August 8, 1972, district court order dismissing a complaint under the Civil Rights Acts (42 U.S.C. §§1981 and 1983, and 28 U.S.C. §1343(3)), which also asserts pendent jurisdiction of a state law claim against a fellow prisoner (Everette), alleging that while plaintiff was a state prisoner at the Huntingdon Correctional Institute, "[o]n or about March 24, 1970 at approximately 11:45 a.m., Defendant . . . Everette physically attacked without provocation Plaintiff . . . in the kitchen at [such] Institute" (par. 11). Plaintiff was assaulted by Everette allegedly "solely because defendants Hess [dietician and kitchen guard], Smith [head steward and kitchen guard] and Brindle [correctional officer] had stopped him from defending himself and due to his reliance on the fact [that such] Defendants . . .who had custody of [Everette] would perform their duty in disarming and restraining

[Everette] and in protecting [plaintiff]."[1] Paragraph 12 of the complaint alleges that plaintiff "suffered great pain and suffering and the permanent loss of sight of his right eye." Paragraph 21-a and d alleges that defendants Smith, Hess and Brindle deprived plaintiff of his civil rights by

> "a. Failing to disarm Defendant Angus Russell Everette while in their custody after he had, in their presence, attacked Plaintiff Warren Curtis with a home-made knife.
>
> . . .
>
> "d. Failing to restrain . . . Everette after he had once attacked Plaintiff . . . with a home-made knife and allowing him to attack Plaintiff a second time causing the loss of sight in his right eye."[2]

Finally, paragraphs 14 and 21-f allege that these three defendants had actual knowledge of the dangerous nature and propensity of Everette.

These allegations were made in a complaint signed by a member of the Bar of the United States District Court for the Eastern District of Pennsylvania, which signature constitutes a certification by such attorney that, to the best of her knowledge, information and belief, there is good ground to support such com-

---

[1] Paragraph 13 of the complaint.

[2] Similarly, paragraph 20 alleges that Hess, Smith and Brindle "under color of state law did intentionally, willfully, and recklessly deprive Plaintiff . . . of the right to be secure in his person, to be free of cruel and unusual punishment and to equal protection of the laws and are jointly and severally liable for their action." See 42 U.S.C. §1983.

plaint.[3] Furthermore, such allegations assert intentional conduct within the rule stated by Judge Aldisert in *Howell v. Cataldi*, 464 F. 2d 272, 281 (3d Cir. 1972), as follows:

> "All that is required is proof that the conduct was intentional. There is no requirement of proof of a further objective toward which the conduct is directed. 'While a specific intent to deprive a person of his constitutional rights is required under criminal sections . . ., neither specific intent nor purpose to deprive an individual of his civil rights is a prerequisite to civil liability under the civil provisions of the Civil Rights Act. . . .'"

See also *Basista v. Weir*, 340 F. 2d 74, 81 (3d Cir. 1965).

In view of the requirement that the allegations of the complaint and all reasonable inferences therefrom must be considered as true on a motion to dismiss,[4] we have concluded that, at this stage of the

---

[3] F. R. Civ. P. 11 provides, *inter alia*:

> "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and believe that there is good ground to support it; and that it not interposed for delay. . . . For a wilful violation of this rule, an attorney may be subjected to appropriate disciplinary action."

[4] See *Walker v. Food Machinery*, 382 U.S. 172, 174-75 (1965), and case there cited in note 4. The brief of appellant (pp. 9 & 10) contends that the allegations and reasonable inferences therefrom support this factual situation:

> "These appellees did not restrain Angus Russell Everette, did not disarm him, and intentionally, wil-

litigation, plaintiff may prove a set of facts constituting a cause of action under 42 U.S.C. §1983 based on a violation of the due process clause of the Fourteenth Amendment. See *Johnson v. Glick*, 481 F. 2d 1028, 1032-33 (2d Cir. 1973), and cases there cited; *cf. Kish v. County of Milwaukee*, 441 F. 2d 901, 904 (7th Cir. 1971). The plaintiff's reliance on his alleged constitutional "right to be secure in his person" (see note 2 above) and on the proposition that the "Fourteenth Amendment is the constitutional basis for 42 U.S.C. 1983" (page 17 of his brief) makes applicable the principle of *Glick* (p. 1032) that a prisoner may not be deprived "of liberty without due process of law." Applying the language of the Supreme Court in *Rochin v. California*, 342 U.S. 165, 172 (1952), the alleged activities of these three state officials "do more than offend some fastidious squeamishness or private sentimentalism. . . . This is conduct that shocks the conscience." Again, at pages 173-74, Mr. Justice Frankfurter said:

> "So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."

---

fully, and recklessly released him to resume his attack on appellant, causing the injury to his eye.

. . .

". . . not more than minutes before Appellant was stabbed in the eye, Everette had attempted to stab appellant with the very same weapon right before the appellant correctional officers' eyes."

As stated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In view of the above reliance on the due process clause of the Fourteenth Amendment, it is not necessary to discuss the possible application of the equal protection clause of that Amendment or of the language concerning cruel and unusual punishment in the Eighth Amendment. See, for example, *Kish v. County of Milwaukee, supra.*

Under these circumstances, the dismissal of the complaint as to the above-mentioned three defendants (Hess, Smith and Brindle) must be set aside.[5] Using the language of *Wiltsie v. California Department of Corrections*, 406 F. 2d 515, 518 (9th Cir. 1969), which is cited by Judge Friendly in *Johnson v. Glick, supra.*

> "It must be clear from what is said above that the 'facts' of this case to which we have been referring are simply those which have been alleged by [Curtis] and which are as yet un-

[5] We note that the district court relied on *Gray v. Creamer*, 329 F. Supp. 418 (W.D. Pa. 1971), in dismissing the complaint on August 8, 1972, and our decision reversing that opinion was not filed until August 14, 1972. See *Gray v. Creamer*, 465 F. 2d 179 (3d Cir. 1972).

proved. We have accepted those allegations of fact as true only for the purpose of this appeal. At the trial the plaintiff will have the burden of proving allegations which state a claim for relief. In addition to contesting those issues of fact, defendants will have an opportunity to develop such other defenses as they may plead."[6]

I.

It is conceded that the complaint states a claim under state law against Everette. This claim arises from the same operative factual situation that constitutes a federal claim against the above three defendants of sufficient substance to confer subject matter jurisdiction on the district court. Under these circumstances, it was held in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), that the district court had the power to hear the pendent claim

> ". . . whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,' U. S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The fed-

[6] As stated in *Brown v. Brown*, 368 F. 2d 992, 993 (9th Cir. 1966):

> "The pleadings filed by appellant contain allegations which could be said to tax a reader's credulity. . . . However, in passing on a motion to dismiss for failure to state a claim, the facts set forth in the complaint must be assumed to be true."

> eral claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole."

The fact finder may well be enlightened rather than confused by having Everette's connection with, and responsibility for, the alleged assault presented in the same trial. See *Nelson v. Keefer*, 451 F. 2d 289, 291 (3d Cir. 1971); *Jacobson v. Atlantic City Hospital*, 392 F. 2d 149, 153-55 (3d Cir. 1968); *Wilson v. American Chain & Cable Co.*, 364 F. 2d 558, 564 (3d Cir. 1966).[7] The Supreme Court recently noted that the trend of decisions throughout the courts of appeals since *Gibbs* has been to recognize the existence of judicial power to hear pendent claims

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[7] The above-cited cases involved situations where, in addition to stating a claim that independently met federal jurisdictional requirements, the complaint stated a related claim involving different parties which met the diversity of citizenship requirement but failed to meet the jurisdictional amount requirement. In each case, the Third Circuit held that, nevertheless, it was permissible for the district court to apply the doctrine of pendent jurisdiction because the claims were such that a plaintiff would ordinarily be expected to try them in one judicial proceeding. Therefore, this case (see third cause of action), where the pendent claim meets the jurisdictional amount but fails to meet the diversity requirement, falls within the principle of *Gibbs*, supra.

involving pendent parties where "the entire action before the court comprises but one constitutional 'case'," as defined above. *See Moor v. County of Alameda*, 441 U.S. 693, 711-15 and n.28 (1973). Pendent jurisdiction of a claim similar to the claim against Everette has recently been approved by the Second Circuit. *See Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F. 2d 800, 809-11 (2d Cir. 1971) (Friendly, Chief Judge).[8] Mr. Justice Brennan has recently stated in *Moor, supra* at 716, that "broad discretion" should be given to the district court "in evaluating such matters," but the district court in this case never considered the possible exercise of discretion since it dismissed the action against all defendants except Everette on the ground that the complaint failed to state a claim upon which relief can be granted. We have concluded that the complaint against Everette should be remanded to the district court so that it may consider the exercise of "the substantial element of discretion inherent in the doctrine of pendent jurisdiction." *See Moor, supra* at 716-17 n.36.[9]

For the foregoing reasons, the district court order will be vacated, and the case remanded for further proceedings consistent with this opinion, insofar as it dismisses the complaint against Everette.

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[8] *See also Almenares v. Wyman*, 453 F. 2d 1075, 1093-95 (2d Cir. 1971); *Astor Hosiery, Inc. v. Grosset & Dunlap, Inc.*, 441 F. 2d 627, 629 (2d Cir. 1971).

[9] We note the unusual circumstances of this case, where the primarily active tortfeasor's part is so crucial in the alleged tortious event.

II.

There were also named as defendants Arthur T. Prasse, Commissioner of Corrections of the Commonwealth of Pennsylvania, and Harry E. Russell, Superintendent of the Huntingdon Correctional Institute. Plaintiff's brief states its claim against these defendants as follows:

> "Although appellees Prasse and Russell were not present at the time of the injury, it is alleged that due to thirteen reasons they breached a duty specifically owed to appellant Warren Curtis, and that as a result of the breach of that duty appellant suffered personal injury and deprivation of constitutional rights. (Complaint, Paragraphs 16, 17; See Appendix, p. 10, 11.) Among other reasons it is alleged that appellees Prasse, Russell, the Bureau of Corrections, and the Commonwealth of Pennsylvania did intentionally, wilfully and recklessly cause appellant's personal injury and deprivation of his constitutional rights by failing to provide adequate training to the guards for the protection of inmates, failing to hire adequate personnel to protect the inmates, permitting prisoners to retain home-made weapons, failing to inspect prisoners leaving the dining room for secreted kitchen utensils which are converted to weapons, failing to inspect the cells for weapons, and allowing the said dangerous conditions to continue with actual knowledge. (Complaint, Paragraphs 16, 17; See Appendix, p. 10, 11). [page 2]
>
> . . .

> ". . . the allegations are made, not on the basis of *respondeat superior*, but on the basis of personal liability for these acts by the defendants, Prasse, Russell, the Bureau of Corrections, and the Commonwealth of Pennsylvania. All these appellees clearly had a common law and statutory duty to keep Warren Curtis in 'safe custody'. 61 Purdon's Statutes §74." [page 12][10]

Assuming that there is a duty under Pennsylvania law to make reasonable efforts to keep plaintiff in "safe custody," there is no allegation of facts indicating intentional action by these defendants "under color of" state law subjecting plaintiff or causing plaintiff to be subjected to deprivation of his civil rights. See *Howell v. Cataldi, supra; Williams v. Field*, 416 F. 2d 483 (9th Cir. 1969), *cert. denied*, 397 U.S. 1016 (1969); *cf. Moor v. County of Alameda*, 411 U.S. 693 (1973); *Kish v. County of Milwaukee, supra*, at 904.[11] The *Kish* case states that

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[10] With reference to possible liability under the doctrine of respondeat superior, which is not relied on by plaintiff in this case. See Vicarious Liability under Section 1983, 6 Indiana Law Review 509 (1973).

[11] It is noted that 61 P.S. 74, cited by appellant, imposes a duty upon defendant Russell as "superintendent" only where a prisoner has been transferred or retransferred due to overcrowded conditions (see 61 P.S. 72); and there is no allegation in the complaint of any transfer or retransfer of plaintiff to the Huntingdon Correctional Institute. Furthermore, it is clear that 61 P.S. 74 imposes no duty upon defendant Prasse, who is alleged to be Commissioner of the Bureau of Corrections.

a clear abuse of discretion in operating a jail is necessary to make the superintendent (Russell) liable for an assault such as this. This court has repeatedly held that conclusory allegations, such as "intentionally, wilfully and recklessly," without supporting facts are not sufficient to make out a complaint under 42 U.S.C. §1983. See *Negrich v. Hohn*, 379 F. 2d 213, 215 (3d Cir. 1967); *Kaufman v. Moss*, 420 F. 2d 1270, 1275 (3d Cir. 1970); *Esser v. Weller*, 467 F. 2d 949, 950 (3d Cir. 1972). There are no allegations that Prasse or Russell had reason to know Everette would commit such an assault or that similar assaults had taken place.

For these reasons, we will affirm the district court order dismissing the complaint as to defendants Prasse and Russell.

III.

The district court order must also be affirmed insofar as it dismissed the complaint against the Commonwealth of Pennsylvania and the Bureau of Corrections of that Commonwealth, who are not "person[s]" within the use of that term in 42 U.S.C. §1983 and hence not subject to suit under that section of the Civil Rights Act. See *Moor v. County of Alameda, supra*, at 699-700 and 706-710; *Monroe v. Pape*, 365 U.S. 167, 187-91 (1961); *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F. 2d 84, 86 n.2 (3d Cir. 1969).

For the above reasons, the above-mentioned August 8, 1972, district court order will be vacated insofar as it dismissed the complaint against defendants Everette, Smith, Hess and Brindle, and the case

will be remanded to the district court for further proceedings as to these defendants in accordance with this opinion. In all other respects, such district court order is affirmed.

McLaughlin, *Circuit Judge* dissenting.

I must respectfully dissent from the conclusion reached by the majority as to defendants Everette, Smith, Hess and Brindle.

The Supreme Court's decision in Monroe v. Pape, 365 U.S. 167 (1961) requires that the Civil Rights Act, particularly 42 U.S.C. §1983, "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Id. at 187. However, this should not be construed to mean that every tort constitutes a denial of rights, privileges and immunities secured by the Constitution and Laws of the United States simply because such tort is committed under "color of law." Here, one inmate of a state correctional institute atrociously assaulted a fellow inmate, appellant herein. Appellant alleged that the presence of the defendants, Hess, Smith and Brindle (prison personnel), at the scene of the attack and their failure to adequately restrain the attacker constituted conduct under "color of law" and therefore a violation of federally guaranteed rights. These allegations are frivolous and clearly insufficient to establish a cause of action under 42 U.S.C. §1983.

Appellant's remedy should have been pursued in the State courts of the Commonwealth of Pennsylvania under general tort principles of the common

law. Therefore, the district court properly dismissed appellant's complaint against all defendants for failure to state a cause of action upon which relief can be granted.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 72-590

Warren Curtis

vs.

Angus Russell Everette
Head Steward Smith
Dietician Hess
Correctional Officer Brindle
Arthur T. Prasse
Harry E. Russell
Bureau of Corrections
Commonwealth of Pennsylvania

MEMORANDUM AND ORDER

Davis, J.:

The plaintiff, Warren Curtis, has filed this action based upon the Civil Rights Act, 42 U.S.C. §1981

et seq. Curtis alleges that while he was an inmate at Huntingdon Prison he was assaulted by a fellow inmate named Angus Everette. The alleged assault took place in the kitchen of the prison. As a result of the assault, Curtis lost his right eye. The plaintiff further alleges that the defendants should be liable under the common-law theory of negligence for failure to adequately protect him and for failing to provide adequate supervision of their employees. The defendants, with the exception of Angus Everette, have filed a Motion To Dismiss the case for failure to state a claim against them upon which relief can be granted.

Initially, the Bureau of Corrections and the Commonwealth of Pennsylvania cannot be defendants in this action since they are not a "person" for purposes of the relevant statute, 42 U.S.C. §1983, *United States ex rel. Gittlemacker v. Philadelphia*, 413 F. 2d 84 (3rd Cir. 1969). For this reason, the present action against these named defendants will be dismissed.

Secondly, the plaintiff is seeking to have this Court adopt a theory that prison officials and employees must be responsible for inmates who have dangerous propensities. This theory would be a good one if the Court had a case based upon a vicious dog that had bitten a person or had a case before it involving a seaman who had a reputation for fighting and injuring a fellow seaman, but this action is predicated upon the Civil Rights Act whereby there must be a violation of an individual's rights which are protected by the Federal Constitution. Liability under the Civil Rights Act is predicated upon

individual action and not upon the doctrine of *respondeat superior*. In *Nugent v. Sheppard*, 318 F. Supp. 314 (N.D. Ind. 1970), the Court in a case predicated upon 42 U.S.C. §1983 held, *inter alia*, the following:

> "Plaintiff contends that entities not subject to direct liability under the Act can still be held liable vicariously, under the doctrine of *respondeat superior*. But that doctrine is a product of the common law, created by courts operating in a vacuum. It has no application in a case like this, where the right of action was created by statute, and the legislature itself delimited the scope of liability. The complaint therefore will be dismissed. . . ."

See also *Sanberg v. Daley*, 306 F. Supp. 277 (N.D. Ill. 1969); *Salazar v. Dowd*, 256 F. Supp. 220, 223 (D. Colo. 1966); *Schwalb v. Connely*, 116 Colo. 195, 179 P. 2d 667 (1947). On this basis alone the Complaint could be dismissed as to the state employees.

A very similar case to the present action was *Summers v. Horton*, 443 F. 2d 225 (4th Cir. 1971). The action was by a former prisoner to recover for injuries sustained in an assault by fellow prisoners. The plaintiff claimed a violation of 42 U.S.C. §1981 et seq. by the police officers, the sheriff and the jailer in wilfully causing injuries to, or failing to prevent injury to the plaintiff at a time when he was in their custody. The Court of Appeals affirmed the District Court which found for the defendants. The Court of Appeals held that the evidence

failed to sustain claims that the jailer was negligent in failing to stop or to allow an assault on the plaintiff who had been placed in a cell block after his arrest. This Court is in complete accord with the *Summers* decision.

Recently, in *Howell v. Cataldi et al.*, F. 2d (3rd Cir. No. 71-1455, June 26, 1972), the Third Circuit discussed the delineation between that conduct which is actionable in state courts as a tort, and that which is actionable in federal courts under §1983. The Court stated:

> "The rights protected by §1983 are public ones created or adopted by the Federal Constitution or by Congress. By comparison, '[a] tort is an act or omission which unlawfully violates a person's right . . . It will be observed that the right violated is private not public . . .'"

In the case before this Court, the alleged assault took place in the kitchen. Needless to say, it is very difficult, if not impossible, for prison officials to control the actions of prisoners one hundred percent of the time. It is not inconceivable that an inmate, who is in a kitchen, can take a knife or some other instrument and hide it, or for that matter get into an argument with a fellow inmate and grab a knife instantaneously and assault the other man. To hold that a hypothetical situation such as this would give rise to a cause of action against the jailer based upon the Civil Rights Act would be to disregard the purpose of the Act. The action taken by the state authorities in supervising the kitchen is purely an in-

ternal matter. Generally, the federal courts must abstain from interjecting itself into the day-to-day operation of state penal institutions. See *Gray v. Creamer*, 329 F. Supp. 418 (W.D. Pa. 1971) and cases cited therein.

There was no indication or prior notice that Everette, the man who allegedly assaulted the plaintiff, had behaved in such a manner before. There is no doubt that Everette has problems adjusting to the rules of society, otherwise he would not be incarcerated; however, this would not allow the prison authorities to foresee that the alleged assault would take place.

Since a cause of action will not lie against any of the state employees or the State, it is necessary to resolve the action against Angus Everette, the inmate who allegedly assaulted the plaintiff. Rule 12(h)(3) of the Federal Rules of Civil Procedure provides: "Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action." It is apparent that there is no subject matter jurisdiction of Everette. The Civil Rights Act would not apply since Everette is not acting "under color" of the law. There is no diversity of citizenship, therefore, there would be no jurisdiction pursuant to 28 U.S.C. §1332. This is an action which should have been brought in the state courts. Accordingly, this action will be dismissed.

ORDER

And Now, this 8th day of August, 1972, it is hereby Ordered that the Motion To Dismiss filed on behalf of all defendants except for Angus Russell Everette is Granted;

It Is Further Ordered that pursuant to Rule 12 (h) (3) of the Federal Rules of Civil Procedure the action against Angus Russell Everette is Dismissed.

By the Court:
JOHN MORGAN DAVIS,
J.

APPENDIX C

TITLE 42 U. S. CODE

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. §1979.

Historical Note

Derivation. Act. Apr. 20, 1871, c.22, §1, 17 Stat. 13.